In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 197

G. L. CHRISTIAN AND ASSOCIATES

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is petitioner's fourth attempt to obtain review by this Court of a decision of the Court of Claims denying petitioner's claim for anticipated profits on a government construction contract. Under this contract, petitioner undertook to build military housing at Fort Polk, Louisiana. The Department of the Army subsequently decided to deactivate Fort Polk; the contract was accordingly terminated for the convenience of the government. At the time of termination, work on the project was only 2.036 per cent

complete. Prior to the final assessment of damages in petitioner's suit on the contract, the Court of Claims considered the effect of § 8.703 of the Armed Services Procurement Regulations. This Regulation required inclusion in certain government contracts of a clause providing that, upon termination for convenience of the government, the contractor could recover only out-of-pocket expenses plus a percentage of profit on the completed portion of the contract. The Court of Claims (per Davis, J.), held that this clause, although not set forth explicitly in the contract, was incorporated therein. 312 F. 2d 418. Rehearing was denied. 320 F. 2d 345. This Court denied certiorari, 375 U.S. 954, denied a rehearing, 376 U.S. 929, and denied petitioner's motion for leave to file a second petition for rehearing. 377 U.S. 1010.[1] The case then went to a commissioner of the Court of Claims for the fixing of damages. By order of May 3, 1965, the Court of Claims accepted the commissioner's recommendations and denied petitioner's motion requesting reversal of the interlocutory decision. The present petition is addressed solely to the denial of this motion.

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[1] The government's brief in opposition to the petition for certiorari was addressed to the merits of the Court of Claims' decision. The interlocutory nature of the decision was not urged as a bar to certiorari, and, we believe, could not have been validly urged. See, *e.g.*, *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, and, most recently, *United States* v. *Adams*, 380 U.S. 949, granting certiorari to review interlocutory decisions of the Court of Claims as to liability, prior to the fixing of damages.

In view of the comprehensive discussion of the merits of this case in the briefs filed in connection with the previous petition for certiorari [2], as well as in the two lengthy opinions of Judge Davis below, we confine our discussion to petitioner's claim that events occurring subsequent to the previous denial of certiorari require a grant of the writ.

The administrative opinions to which petitioner refers (Pet. 8-12) add nothing to the case. The opinion of an official of the General Services Administration (see Pet. 8-9) is hardly dispositive as to the purpose and effect of a regulation adopted by the Department of Defense. Indeed, this official's proposal—that the regulations be amended for the purpose of avoiding possible consequences of the decision below—merely serves to point out that any problems which the decision below may have created can be solved by amendments to the pertinent regulations. In *Valley Cleaners*, ASBCA No. 10253 (Pet. 10-11), the Armed Services Board of Contract Appeals, while questioning the wisdom of the decision below, was dealing with a different regulation, involving different language and different policy, from that involved in the instant case. The other administrative opinions referred to by petitioner are also irrelevant.[3]

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[2] In addition to the briefs of the parties, two *amicus* briefs were filed in this Court.

[3] In *World Electrical Specialties Corp.*, ASBCA No. 9510, the Board concluded that the contract was not of the type for which § 8.703 of the ASPR makes inclusion of a termination for convenience clause mandatory. In Comp. Gen. Dec. B-151787, 43 Comp. Gen. Dec. 217 (discussed in the pre-

Petitioner is incorrect in stating that the Court of Claims has refused to follow the decision below. In both *Goldwasser* v. *United States*, 325 F. 2d 722 (discussed in the petition for rehearing of the previous denial of certiorari), and *Dale Construction Co.* v. *United States*, Ct. Cl. 134-57 (December 11, 1964), the Court of Claims simply held that a termination by the government for default on the contractor's part could not later be changed into a termination for convenience, after a determination that the contractor had not defaulted.

Petitioner has presented no compelling reason why this Court should again reconsider its previous denial of certiorari. The petition should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

June 1965

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vious petition for certiorari), the Comptroller General refused to invalidate an invitation to bid for failure to follow a policy memorandum of the Secretary of Defense, on the ground that it is not the business of the General Accounting Office to enforce adherence to departmental policies of this nature—as contrasted with procurement policies prescribed by law and implemented by statutory regulation. *Aero Corp.*, ASBCA No. 8178, and *Homer Electric Ass'n Inc.*, ASBCA No. 7649, are discussed in the government's brief in opposition to the previous petition for certiorari (at page 9, n. 5). The procurement manuals referred to by petitioner (Pet. 9) are discussed by the court below in its interlocutory decision (Pet. 74a-75a, 320 F. 2d at 349-350).

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